No. 89-96

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES MILBURN, JR., a minor, by
Charles B. Milburn, his father and next friend,
Petitioners,

v.

ANNE ARUNDEL COUNTY DEPARTMENT OF
SOCIAL SERVICES, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

This case arises from petitioner's voluntary placement in foster care between 1971 and 1973. The specific questions presented are:

1. Has petitioner, who was voluntarily placed in foster care by his parents, stated a cause of action under the Constitution against state officials for injuries allegedly caused by his private foster parents?

2. Are private foster parents "state actors" within the meaning of 42 U.S.C. §1983 when they did not act at the direction of the state, received no state salary, and did not perform a function which is exclusively that of the state?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioner Charles Milburn, Jr., filed this action pursuant to 42 U.S.C. §1983 seeking monetary relief from defendants (now respondents) for

injuries alleged to have occurred between 1971 and 1973, while he was in foster care in the private home of respondents Karl and Wendy Tucker. A United States Magistrate (now a District Court Judge, The Hon. Frederick N. Smalkin) issued a report and recommendation recommending that petitioner's complaint be dismissed (App. at 13a);[1] after a de novo review, the District Court (The Hon. Joseph C. Howard) dismissed the action (App. at 12a-25a); and on appeal, the United States Court of Appeals for the Fourth Circuit (Circuit Judges Widener, Chapman, and Wilkins) affirmed that dismissal (App.

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[1] Citations in the form "App. at __" are to the appendix to the petition for writ of certiorari. Notwithstanding Sup. Ct. R. 21.1(k)(ii), petitioner omitted from the appendix the Magistrate's report, a report which the Fourth Circuit described as "a thorough memorandum opinion." (App. at 3a-4a.)

1a-11a), and then denied a petition for rehearing. (App. at 26a.)

Petitioner alleges that respondents violated his rights under the Due Process Clause of the Fourteenth Amendment by "continued and negligent care and placement in the home of the Tuckers." (App. at 3a.) The Fourth Circuit held that no cause of action was stated because the State "by the affirmative exercise of its power had not restrained the plaintiff's liberty; he was voluntarily placed in the foster home by his natural parents." (App. at 6a) (emphasis supplied.) The court below also held that petitioner's foster parents were not state actors, and thus petitioner had failed to state a claim

against them under 42 U.S.C. §1983. (App. at 6a-11a.)[2]

ARGUMENT: REASONS FOR DENYING REVIEW

FURTHER REVIEW OF THIS FACTUALLY UNIQUE CASE IS UNWARRANTED BECAUSE THE DECISIONS OF THE COURTS BELOW ARE IN FULL ACCORD WITH THE DECISIONS OF THIS COURT.

Petitioner was last in foster care in the Tucker's home in 1973, and he was in foster care not because of any action by the State, but because his parents voluntarily placed him there. These unique facts make this case an inappropriate vehicle to address broad issues regarding the existence and scope of the

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[2] Shortly after noting his appeal to the Fourth Circuit, petitioner filed a parallel state court action alleging that some of the respondents had breached their duties to him under state tort law. See App. at 11a. That action is still pending.

State's affirmative duty to provide constitutional protection for children in foster care.

Further, the Fourth Circuit's state action decision, rejecting the claim that private foster parents are state actors, is in full accord with a long line of this Court's decisions, including the decision last Term in National Collegiate Athletic Ass'n v. Tarkanian, ___ U.S. ___, 109 S.Ct. 454 (1988).

A. The Due Process Issue Raised In The Petition Does Not Warrant Review.

1. Petitioner Was Voluntarily Placed In A Foster Home By His Natural Parents. Thus, This Case Does Not Present The Issue Left Open In DeShaney.

Petitioner argues that the due process issue presented in his petition is the issue left open in DeShaney v.

Winnebago County Dept. of Social Services, ___ U.S. ___, 109 S. Ct. 998, 1006 n.9 (1989). See Petition at 6-11. That misstates this case because petitioner was never deprived of his freedom by the State. Rather, as the Fourth Circuit held, "[t]he State of Maryland by the affirmative exercise of its power had not restrained the plaintiff's liberty; he was voluntarily placed in the foster home by his natural parents." (App. at 6a) (emphasis supplied.)

The constitution does not impose liability on the State for the unintended consequences of actions voluntarily undertaken by petitioner's parents. See DeShaney, 109 S.Ct. at 1003-07. Due process protection arises only when the State takes affirmative action in restraining an "individual's freedom to act on his own behalf - through incar-

ceration, institutionalization, or other similar restraint of personal liberty. . . ." Id. at 1006. The absence of state-imposed restraint on petitioner's liberty places this case squarely within the holding of DeShaney.[3]

In footnote 9 of the DeShaney opinion, the Court recognized that a different case might be presented were the State responsible for restraining petitioner's liberty:

> Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home

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[3] In addition, as both courts below recognized, because petitioner was a voluntary foster care placement, rather than being placed involuntarily pursuant to a judicial determination of need for protection, petitioner failed to state a §1983 claim based upon an alleged violation of a federal statute (the AFDC Act, 42 U.S.C. §608(f)), because that statute was inapplicable to voluntary placements when petitioner was in foster care. (App. at 18a-19a, 4a n.1.) Petitioner no longer claims to the contrary.

> operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.

Ibid. n.9.[4] Petitioner strains to bring his case within this analogy to "incarceration or institutionalization." See Petition at 6-11. This effort fails because his liberty was restrained by his parents, not by the State.

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[4] As examples of cases where such a duty might arise, the Court in DeShaney cited (109 S.Ct. at 1006 n.9) Doe v. New York City Dept. of Social Services, 649 F.2d 134, 141-42 (2d Cir. 1981); and Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791, 794-97 (11th Cir. 1987), cert. denied, ____ U.S. ____, 109 S.Ct. 1337 (1989), both of which involved situations where the government removed a child from his natural parents without their consent and placed the child in a foster home. Here, petitioner was not so removed; his parents, not the State, placed him in foster care.

2. Even If Petitioner's Complaint Stated A Federal Constitutional Claim, Respondents Are Entitled To Immunity Under The Qualified Immunity Doctrine.

An alternative reason for denying the petition is that respondents are entitled to qualified immunity as a matter of law. See Harlow v. Fitzgerald, 457 U.S. 800 (1982); Anderson v. Creighton, 483 U.S. 635 (1987). Petitioner alleges that respondents' actions or inactions between June 10, 1971, and May, 1973, violated his constitutional rights. (App. at 2a-3a.) As the district court correctly held, "the asserted right [was] not established clearly enough at the time of the alleged deprivation to avert the application of [qualified]

good faith immunity under Harlow v. Fitzgerald." (App. at 23a) (footnote omitted.)[5]

Thus, a decision on the constitutional issue would not lead to any relief for petitioner. Therefore, petitioner should be left to pursue his parallel state tort action in the courts of Maryland. See App. at 11a.[6]

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[5] Respondents' position is that it was not until at least 1983, 10 years after the last allegation in petitioner's complaint, that it was even remotely foreseeable that the affirmative right of protection asserted by petitioner might exist. See Estelle v. Gamble, 429 U.S. 97 (1976); Martinez v. California, 444 U.S. 277 (1980); Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985); Fox v. Custis, 712 F.2d 84 (4th Cir. 1983).

[6] In the courts below, petitioner also claimed that various public and private health care providers (Baltimore City Hospitals, North Arundel Hospital and two of its employees, Dr. Sergio Alvarez and Nurse Hazel Gent) had violated his constitutional rights. The Fourth Circuit rejected these claims. See App. at 6a. In his petition to this Court, (continued)

B. Action By Purely Private Foster Parents Is Not Action Under Color Of State Law.

The Magistrate, the District Court, and the Fourth Circuit, relying on long-settled principles of law, concluded correctly that petitioner's foster parents were not state actors within the meaning of 42 U.S.C. §1983. (App. at 6a-11a, 13a-16a.) The Fourth Circuit carefully analyzed this issue and concluded that the foster parents (the Tuckers) were not state actors because "[t]he State of Maryland was not responsible for the specific conduct of which the plaintiff complains, that is, the physical child abuse itself. It exercised no coercive power over the Tuckers; neither did it encourage them. The care of foster children is not

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petitioner has abandoned his claims against these parties.

traditionally the exclusive prerogative of the State." (App. at 11a.)

This analysis is in full accord with Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-55 (1974); and National Collegiate Athletic Ass'n v. Tarkanian, 109 S.Ct. at 461-65. As the courts below held, the private foster parents did not act under color of state law because their conduct is not fairly attributable to the State. See id. at 465.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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